IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MR. JUSTICE K.P.BALACHANDRAN

WEDNESDAY, THE 18TH JULY 2007 / 27TH ASHADHA 1929

MFA.No. 99 of 2001

OS.4/1987 of ADDL.DISTRICT COURT, THRISSUR
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APPELLANTS/DEFENDANTS 1, 3 & 6:

1. **JOSEPH, S/O THATTIL IYYU JOSEPH, THAIKKATTUSSERI DESOM, EDAKKUNNI VILLAGE, THRISSUR TALUK (DIED).**

2. **THRESSIAKUTTY, W/O KOONAMPILAVU RAPPAI, PALAKKAL DESOM, VENGINISSERI VILLAGE.**

3. **Fr.MARCHALLUS, S/O THATTIL IYYU OUSEPH, (ST.JOSEPH'S CHURCH, PARANNOOR, CHOONDAL).**

ADDL. APPELLANTS 4 TO 6 IMPLEADED

4. **ROSILY JOSEPH, W/O LATE JOSEPH, THATTIL IYYU HOUSE, THAIKKATTUSSERI DESOM, EDAKKUNNI VILLAGE, THRISSUR TALUK.**

5. **JOSHY.T.J., S/O LATE JOSEPH, DO. DO.**

6. **PRINCY.T.J., D/O LATE JOSEPH, DO. DO.**

Impleaded as per order dt. 6.2.01 on CMP 956/01.

BY ADV. SRI.K.GEORGE VARGHESE KANNANTHANAM
SRI.TONY GEORGE

RESPONDENTS/PLAINTIFFS 1 & 2 & DEFENDANTS 2 & 4:

1. MARY, D/O THATTIL KOKKI PORINCHU, THAIKKATTUSSERI DESOM, EDAKKUNNI VILLAGE, THRISSUR TALUK.

2. OUSEPH, S/O DO. DO. DO.

3. ANTHONY, S/O THATTIL IYYU JOSEPH, DO. DO.

4. MARY, W/O ITTOOP, RESIDING AT KOTTAPADI.

BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.A.M.PRATAP SINGH

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 18/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.P.NO.906/2001 IN MFA 99/2001

DISMISSED

18.7.2001

SD/-J.B.KOSHY, JUDGE
SD/-K.P.BALACHANDRAN, JUDGE

/TRUE COPY/

J.B.Koshy & K.P.Balachandran, JJ.

M.F.A.No. 99 of 2001

JUDGMENT

Koshy, J.

Kathreena, D/o Ouseph, died on 24.11.1982 at Thrissur Jubilee Mission Hospital. The plaintiffs, who are the children of Kunhila, the sister of Kathreena, filed an application for Letters of Administration, based on Exhibit A1 will dated 25.10.1975. Since there was objection, it was numbered as O.S.No.4/87. The defendants were two brothers and children of one deceased brother Joseph. The court below found that the will was properly executed complying with all legal formalities and there were no suspicious circumstances. Hence, Letters of Administration was granted. This appeal is filed by defendants 1, 3 and 6, i.e., two children of late Joseph and another brother of Kathreena. During the pendency of the appeal said first appellant died and his legal representatives were impleaded.

2. The second plaintiff was examined as PW4. The will is a registered one. PW1, the Director of Jubilee Mission Hospital, Thrissur, proved death of Kathreena in 1982. PWs 2 and 3 are the attesting witnesses. They deposed that Kathreena signed in the will in their presence and they signed in each other's presence. They also stated that they went over to the Registrar's Office and attested the will. Once the execution of the will is proved, if there are any suspicious circumstance, the person, who is pleading of suspicious circumstance, has to prove it. The witnesses PWs 2 to 5, examined on the side of the plaintiffs, proved that Kathreena was in good health at the time of executing the will and she has got testamentary capacity. At the time of death Kathreena had 68 cents of property and a residential house therein. It is also seen that out of that 12 3/5 cents of property with the house was bequeathed to brother's son Anthony (second defendant) and rest of the property was bequeathed to the plaintiffs.

3. It is the contention of the appellants that Kathreena was residing with them and they were looking after her towards the end of her life. The will was executed in 1975 and that was the last will. The brother of deceased Kathreena (sixth defendant) was examined as RW2. According to him, Kathreena had weakness prior to 3-4 years of her death. But, he has got no case that she was ill in 1975. According to him, there is every likelihood of executing the will by some other person by impersonation. He has not taken any steps to compare the signatures. Further, the attesting witnesses stated that they have signed the will and they saw testator signing the will. They also deposed that they have gone to the house of Ouseph and at his request they attested the will. Merely because they visited the house of the plaintiffs, it cannot be stated that they had not attested the will as witnesses. All the registration formalities were also done. Exhibit A1 will would show that the will was executed in accordance with law after

complying with all formalities necessary under Section 63(c) of the Indian Succession Act and it was proved as provided under Section 68 of the Indian Evidence Act. In **Shashi Kumar Banerjee v. Subodh Kumar Banerjee** (AIR 1964 SC 529), at paragraph 4, a Constitution Bench of the Supreme Court, observed as follows:

> "The principles which govern the proving of a will are well settled (see H.Venkatachala Iyengar v. B.N.Thimmajamma, 1959 Supp (1) SCR 426; (AIR 1959 SC 443) and Rani Purnima Devi v. Khagendra Narayan Dev (1962) SCR 195; (AIR 1962 SC 567). The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S. 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by

law is sufficient to discharge the onus."

Here, the propounder has discharged the onus. Once, the execution of Exhibit A1 will, after complying with all legal formalities, with full testamentary capacity of the testator, is proved, the burden shifts. In **Naresh Charan Das Gupta v. Paresh Charan Das Gupta** (AIR 1955 SC 363), a Constitution Bench of the Apex Court held as follows:

> "The main question that arises for out decision is whether the will in question was executed under the undue influence of respondent 1. "When once it has been proved", observed Lord Cranworth in '*Boyse v. Rossborough*', (1857) 6 HLC 2 (A) "that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it." Vide also - '*Craig v. Lamoureux*'. AIR 1919 PC 132 (B). In the present case, it is not in dispute that the testator executed the

> will in question, and that he had the requisite mental capacity at that time. The burden, therefore, is on the appellant to establish that the will was the result of undue influence brought to bear on him by respondent 1."

But, suspicious circumstances, if any, have to be proved by the defendants (appellants). But, they were not able to disprove the genuineness of the will and any suspicious circumstance or testamentary capacity of the testator or any irregularity in the execution of the will.

In the circumstances, we see no merit in the appeal and the appeal is dismissed.

(J.B.Koshy, Judge)

18th July, 2007

(K.P.Balachandran, Judge)

tkv

J.B.Koshy & K.P.Balachandran, JJ.

M.F.A.No.99 of 2001

JUDGMENT

18th July, 2007